

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.2959 OF 2004

Shri Chandrakant Govind Wadkar : Petitioner
V/s.

Shri Bhaumsingh Harisingh Rathod : Respondent

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Mr.Balkrishna D. Joshi for the petitioner.

Mr.Bharat Joshi with Mr.Ishariprasad Bagaria for the
respondent.

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CORAM : S.A. BOBDE, J.

March 22, 2005.

P.C.:

1. Rule, returnable forthwith.

Mr.Bharat Joshi waives service of rule on behalf
of the respondent.

Heard by consent.

2. The petitioner has filed an election petition
challenging the election of the respondent to ward no.129
of the Bombay Municipal Corporation. In the election
petition, the petitioner applied for issue of witness
summons to the Election Officer of the B.M.C. for

producing the following documents:-

- "1. Electoral Rolls of booth No.92 of Ward No.129 consisting of Electoral part No.211, 210 and 213 along with list of names deleted from voters list.
2. The Serial Nos. and names of the voters who cast their vote on the election date on the said booth no.92 and to depose before this Hon'ble Court."
3. This prayer has been rejected by the learned Addl. Chief Judge trying the election petition by an order dated 16.1.2004. The petitioner has challenged that order by the present Writ Petition.
4. One of the crucial points for determination in the election petition is, whether, in respect of booth no.92 of ward no.129, a large number of voters, about 300, have voted inspite of their names having been deleted from the electoral rolls. There are sufficient pleadings in the election petition in that regard. The respondent has been

declared elected by a margin of 58 votes.

5. In the course of evidence, the petitioner first sought a witness summons for Yeshwant R. Panchal, who was the Returning Officer of ward no.129 in the election. That witness, however, deposed that he was not in a position to produce any document mentioned in the witness summons, which included the documents sought now, since he was retired from service at the time of his deposition. The petitioner, therefore, sought the issue of the present witness summons which has been rejected. The intention behind issuing the present witness summons is to examine the Election Officer of the B.M.C. along with the aforesaid documents for the same purpose for which Panchal was examined, viz., to prove whether the persons whose names were deleted from the electoral rolls have cast their votes. This point, as stated earlier, is indisputably crucial since the respondent has succeeded in the election by a margin of 58 votes.

6. The learned trial Judge has rejected the witness summons chiefly on the ground that grant of witness summons for producing the marked electoral rolls would vitiate the secrecy of the election process and that this cannot be done unless a cast-iron case is made out. While

taking this view, the learned Judge has relied heavily on the decision of the Supreme Court in Sasanagouda v. Dr. S.B. Amarkhed (A.I.R. 1992 S.C. 1163). In that decision, having regard to the provisions of rule 93 of the Conduct of the Elections Rules, 1961 framed under the Representation of the People Act, 1951, their Lordships have taken the view, following the decision in Hari Singh v. Hira Singh (A.I.R. 1984 S.C. 396), that a perusal of this Rule clearly shows:

"that the Legislature intended to make clear distinction between one set of documents and another. So far as counter-foils and the marked copy of the electoral rolls were concerned, there was a strict prohibition for opening these documents unless the Court was fully satisfied that a cast-iron case was made out for the same; whereas documents mentioned in Cls. (a) and (d) of sub-rule (2) of R.93 (sic) could be liberally allowed to be inspected."

7. Rule 93 which does not govern the present case reads as follows:-

"93. Production and inspection of election

papers.--(1) While in the custody of the district election officer or, as the case may be, the returning officer--

(a) the packets of unused ballot papers with counterfoils attached thereto;

(b) the packets of used ballot papers whether valid, tendered or rejected;

(c) the packets of the counterfoils of used ballot papers;

(d) the packets of the marked copy of the electoral roll or, as the case may be, the list maintained under sub-section (1) or sub-section (2) of section 152; and

(dd)

(e) the packets of the declarations by electors and the attestation of their signatures:

shall not be opened and their contents shall not be inspected by, or produced before, any person or authority except under the order of a competent court.

(1A)

(2) Subject to such conditions and to the payment of such fee as the Election Commission may direct.--

(a) all other papers relating to the election shall be open to public inspection; and

(b) copies thereof shall on application be furnished."

8. Having regard to the interpretation placed by the Supreme Court in that case and the observations of the Supreme Court that the Court should be circumspect in summoning the record covered by rule 93(1), the trial Court has rejected the present application.

9. Mr. Balkrishna Joshi, learned counsel for the petitioner, submitted that the reliance on the aforesaid decision by the learned trial Judge in the present case is misplaced in view of the election rules framed under the Bombay Municipal Corporation Act. Rule 34, to the extent relevant, reads as follows:-

"34. Ballot papers, extracts of election roll etc., to be sealed.-- The presiding officer of each polling station shall, after the close of the poll, close the slit on the ballot box or boxes by pasting a special slip and also enclose in separate packets and seal the following--

- (a) Books of ballot papers wholly or partly used;
- (b) Books of ballot papers wholly unused;
- (c) Tendered ballot papers used;
- (d) Tendered ballot papers unused;
- (e) Copies of extract of election roll used by the polling officers in charge of ballot papers;
- (f)"

This case is about clause (e) i.e. extract of election roll used by the polling officers. It is clear from a comparison of the statutory scheme that there is no embargo on the production of the documents referred to in rule 34 except under the orders of a Court, of the kind there is in rule 93 of the Conduct of Election Rules. That, however, does not mean that the documents sealed under the above rules can be opened without directions of a competent Court. There is no doubt that any documents referred to in rule 34 may not be directed to be produced for the asking. Even under Rule 34, the Court must be circumspect and ensure that the documents which must be sealed are not unnecessarily opened. I am of view that there is no difference in the two statutory schemes as to the degree of secrecy that must be followed in directing production of the documents mentioned in the Rule. In cases under any of the Rules, the Court has the power to direct production of the sealed documents. Rule 93 of the Conduct of Election Rules expressly declares that the documents shall not be opened except under the order of a competent Court, whereas, Rule 34 is silent on this.

10. It is, therefore, necessary to see whether the trial Judge was right in refusing to grant witness summons asked for by the petitioner in the present case. Undoubtedly, a

case has been made out in the pleading that voters whose names have been deleted have been allowed to vote. Their number is said to be about 300. The respondent has been returned by a margin of about 58 votes. An inquiry into whether such voters have voted is crucial. The trial Court, in the first instance, granted a witness summons to the petitioner to examine the Returning Officer Panchal with the same set of documents which was sought again when Panchal expressed his inability to produce them. In my view, it was, therefore, unusual on the part of the trial Court to have rejected the request to issue a witness summons for the same purpose for the same set of documents to another witness.

11. That apart, it is necessary to examine the validity of the order rejecting the witness summons. On a reading of the order of the trial Court, I am of view that the trial Court has committed an error of law apparent on the face of the order in observing that the extract of the electoral rolls is a secret document which has been kept in the custody of the B.M.C. as per rule 34(e) of the B.M.C. Election Rules and, therefore, its production cannot be granted, since a cast-iron cast has not been made out by the petitioner for lifting the secrecy. In fact, it appears from the order that the trial Court has

mis-directed itself in believing the election rules on which the petitioner sought production contains signature of each voter and that, therefore, disclosing the names of the said voters will prejudice the case of the respondent. This is factually incorrect. The marked electoral rolls do not contain the signature of each voter. In fact, a marked electoral roll is merely an electoral roll which is marked by the Returning Officer for the purpose of recording which voter at which serial number has cast his vote. This position is undisputed before me.

12. Mr. Bharat Joshi, learned counsel for the respondent, however, strongly contended that the petitioner has miserably failed to make out a case for issue of witness summons since one of the witnesses produced by the petitioner has himself categorically admitted in the course of his evidence that no voter whose name has been deleted came to cast his vote in booth no.92. The learned counsel for the respondent has exhaustively relied on the deposition of that witness. It is possible that in a given case, a witness called by a party may not fully support his case. In such a situation, the party is not under any disability from proving his case by any means available to him in law, including summoning of another witness for the purpose. In this case, the petitioner has

sought witness summons for the Chief Electoral Officer of the B.M.C. who was in possession of the official record relevant to the petitioner's case, viz., marked copy of the electoral rolls. In the circumstances, the petitioner could not be said to have been debarred from having witness summons issued for the Election Officer merely because one of his witnesses did not fully support his case. In any event, evaluation of the witness's testimony is another matter which is not necessary at this stage.

13. Having regard to the above, I am of view that in the present case, the evidence sought for, being crucial to the petitioner's case and having regard to the fact that production of a marked copy of the electoral roll would not vitiate the secrecy of the ballot or reveal the identity of the voters, I am of view that the interests of justice which is paramount, required the learned trial Judge to allow the production of electoral rolls and allow the issue of witness summons as sought for by the petitioner.

14. In the result, the impugned order is liable to be set aside. The rule is made absolute in terms of prayer clause (a).

15. At this stage, the learned counsel for the respondent prays for stay of this order. The operation of this order shall stand stayed for a period of four weeks from today.

Sd/-

S.A. BOBDE, J.